

STATE OF MICHIGAN
COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

UNPUBLISHED
October 12, 2017
APPROVED FOR
PUBLICATION
December 5, 2017
9:05 a.m.

v

CAMPBELL-DUROCHER GROUP PAINTING
AND GENERAL CONTRACTING, LLC, JACK
CAMPBELL, and CARRIE CAMPBELL,

No. 331384
Lenawee Circuit Court
LC No. 13-004900-CK

Defendants/Third-Party Plaintiffs-
Appellees,

and

CITY OF ADRIAN and ADRIAN DESIGN
GROUP, PLC,

Third-Party Defendants.

Advance Sheets Version

CAMPBELL-DUROCHER GROUP PAINTING
AND GENERAL CONTRACTING, LLC,

Plaintiff-Appellee,

v

CITY OF ADRIAN,

No. 331389
Lenawee Circuit Court
LC No. 13-004646-CK

Defendant-Appellant,

and

ADRIAN DESIGN GROUP, PLC,

Defendant.

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff,

v

CAMPBELL-DUROCHER GROUP PAINTING
AND GENERAL CONTRACTING, LLC, JACK
CAMPBELL, and CARRIE CAMPBELL,

Defendants/Third-Party Plaintiffs-
Appellees,

and

CITY OF ADRIAN,

Third-Party Defendant-Appellant,

and

ADRIAN DESIGN GROUP, PLC,

Third-Party Defendant.

No. 331802

Lenawee Circuit Court

LC No. 13-004900-CK

Advance Sheets Version

PULLUM WINDOW CORPORATION,

Plaintiff,

v

JACK CAMPBELL, CARRIE CAMPBELL, and
CAMPBELL-DUROCHER GROUP PAINTING
AND GENERAL CONTRACTING, LLC,

Defendants/Third-Party Plaintiffs-
Appellees,

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant,

and

No. 331803

Lenawee Circuit Court

LC No. 14-004948-CK

CITY OF ADRIAN,

Third-Party Defendant-Appellant,

and

ADRIAN DESIGN GROUP, PLC,

Third-Party Defendant.

Advance Sheets Version

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated cases, Auto-Owners Insurance Company (Auto-Owners) and the city of Adrian (the City) appeal by leave granted the trial court's order denying their respective motions for summary disposition. Auto-Owners sought summary disposition regarding its claims for indemnification from appellees, Campbell-Durocher Group Painting and General Contracting, LLC (Campbell-Durocher), Jack Campbell, and Carrie Campbell.¹ The City sought summary disposition of the Campbells' claims for breach of contract. For the reasons explained in this opinion, we affirm the trial court's denial of the City's motion, reverse the trial court's denial of Auto-Owners' motion, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

These appeals arise from a restoration project in the City that went awry. The City received a grant to fund a historical-facade-restoration project (the project) involving five downtown buildings. Campbell-Durocher was the successful bidder and was named general contractor for the project, and a building contract between the City and Campbell-Durocher was entered into on August 12, 2009. Pursuant to the requirements of MCL 129.201 *et seq.*, a public works bonding act, Campbell-Durocher provided payment and performance bonds with itself as principal and Auto-Owners as surety. In relation to the bonds, an indemnity agreement was entered into by Campbell-Durocher and Auto-Owners.

According to the building contract, the agreement was scheduled to expire on December 19, 2009. The project was not completed by that date. However, several change orders were approved by the parties that provided for completion dates well beyond December 19, 2009. Notably, before the contract expired, a change order relating to storefront windows and doors was signed that required substantial completion by May 13, 2010. Due to

¹ When appropriate, Campbell-Durocher, Jack Campbell, and Carrie Campbell will be referred to collectively as "the Campbells."

various issues related to the windows and doors, the project was still not completed by the date specified in the change order.

On August 24, 2010, the City ordered Campbell-Durocher off the job site. In correspondence dated August 26, 2010, the City stated, “The City of Adrian has terminated the contract with Campbell-Durocher Group as of August 24, 2010.” As reasons for this decision, the City noted that Campbell-Durocher failed to complete the project on schedule, failed to pay a supplier, and failed to offer an acceptable solution to the storefront window and door issue.

As a result of the noncompletion of the project, the City filed a written bond claim with Auto-Owners. On September 21, 2011, Auto-Owners settled the City’s bond claim for approximately \$127,000. Auto-Owners also paid a bond claim of approximately \$62,000 to ABC Supply Company, an unpaid supplier for the project.

The project resulted in the three lawsuits underlying this appeal, which were consolidated in the trial court. Other entities were named in the complaints, but they do not factor in this appeal. Relevant to this appeal, Auto-Owners sought reimbursement from the Campbells for amounts paid on the bond, totaling \$189,277.64, as well as other costs incurred by Auto-Owners, including attorney fees. Also relevant to this appeal, the Campbells alleged that the City breached the building contract by failing to pay approximately \$60,000 for work performed by the Campbells and by terminating the contract in August 2010 without providing 90 days’ notice as required under § 2.2 of the contract.

Several motions for summary disposition were filed by various parties, including the motions by the City and Auto-Owners that are at issue in this appeal. The City moved for summary disposition under MCR 2.116(C)(8) (failure to state claim) and (C)(10) (no genuine issue of material fact), contending that the building contract terminated on December 19, 2009, or, at the latest, on May 13, 2010. On the basis of its assertion that the contract had expired, the City argued that it did not breach the contract by terminating the Campbells in August 2010 without providing 90 days’ notice. In comparison, relying on MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10), Auto-Owners argued that summary disposition was proper because the unambiguous terms of the indemnification agreement entitled Auto-Owners to indemnification from the Campbells for all “bond losses.”

The trial court denied the City’s and Auto-Owners’ motions, stating, without any elaboration, “that there are still issues of fact and law that need to be brought before this Court.” The City and Auto-Owners moved for reconsideration, and the trial court denied the motions. The City filed applications for leave to appeal in this Court in each of the three lawsuits (Docket Nos. 331389, 331802, and 331803),² and Auto-Owners filed an application for leave to appeal in

² The Campbells’ breach-of-contract claim against the City is at issue in all three cases. In one of the cases, the Campbells filed a breach-of-contract claim against the City. In the other two cases, the Campbells filed third-party complaints against the City for breach of contract.

its action for indemnification (Docket No. 331384). This Court granted the applications and consolidated the appeals.³

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). While the parties cited MCR 2.116(C)(8), (C)(9), and (C)(10), they relied on evidence outside the pleadings. Consequently, we will review their motions under MCR 2.116(C)(10). MCR 2.116(G)(5); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. AUTO-OWNERS' APPEAL

On appeal, Auto-Owners argues that the trial court erred when it denied summary disposition on Auto-Owners' contractual indemnification claim. According to Auto-Owners, the express terms of the indemnity agreement required the Campbells to indemnify Auto-Owners for all losses incurred by reason of the execution of the bonds. Auto-Owners asserts that its payment of the bond claims is prima facie evidence of the Campbells' liability and that the Campbells have failed to offer any evidence that Auto-Owners paid the bond claims in bad faith.

An indemnity contract is interpreted in accordance with the rules of construction that govern any other type of contract. *Ajax Paving Indus, Inc v Vanopdenbosch Const Co*, 289 Mich App 639, 644; 797 NW2d 704 (2010). Accordingly, "[u]nder ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997).

This Court's main goal in the interpretation of contracts is to honor the intent of the parties. The words used in the contract are the best evidence [of] the parties' intent. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. [*Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 446; 886 NW2d 445 (2015) (quotation marks and citations omitted).]

³ *Auto-Owners Ins Co v Campbell-Durocher Group*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket Nos. 331384 and 331802); *Campbell-Durocher Group v City of Adrian*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket No. 331389); *Pullum Window Corp v Campbell*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket No. 331803).

“A contract of indemnity should be construed so as to cover all losses, damages, or liabilities to which it reasonably appears to have been the intention of the parties that it should apply” *Title Guaranty & Surety Co v Roehm*, 215 Mich 586, 592; 184 NW 414 (1921) (opinion by FELLOWS, J.) (quotation marks and citation omitted).

In this case, the indemnity agreement specifically obligated the Campbells to

indemnify [Auto-Owners] against all loss, costs, damages, expenses and attorneys fees whatever, and any and all liability therefor, sustained or incurred by [Auto-Owners] by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained[.]

The foregoing language unambiguously required the Campbells to indemnify Auto-Owners for all liability and expenses sustained by reason of the execution of the bonds.

In contesting Auto-Owners’ entitlement to reimbursement, the Campbells do not appear to dispute that the indemnity agreement, in general, obligated them to reimburse Auto-Owners for costs incurred pursuant to the bonds. Instead, the Campbells contest whether Auto-Owners properly settled the bond claims. Specifically, they argue that Auto-Owners is not entitled to reimbursement because Auto-Owners acted in bad faith by failing to conduct an investigation into the bond claims. According to the Campbells, had Auto-Owners investigated and consulted with the Campbells, it would have discovered that the City was not entitled to payment on its bond claims because the City had breached the building contract.

Relevant to the Campbells’ arguments, the indemnity agreement contained several pertinent clauses involving Auto-Owners’ right to pay claims and to seek reimbursement from the Campbells. Specifically, the indemnity agreement provided that Auto-Owners

shall have the right, and is hereby authorized but not required . . . [t]o adjust, settle or compromise any claim, demand, suit, or judgment upon said bond or bonds, or any of them, unless the undersigned shall request [Auto-Owners] to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with [Auto-Owners], at the time of such request, cash or collateral satisfactory to it in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs and attorneys’ fees[.]

Additionally, the agreement specified that the extent of the Campbells’ liability under the indemnity agreement

shall extend to, and include, the full amount of any and all sums paid by [Auto-Owners] in settlement or compromise of any claims, demands, suits, and judgments upon said bond or bonds, or any of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorney’s fees, as aforesaid,

which may be made under the belief that such were necessary, whether necessary or not[.]

Further, in the event that Auto-Owners paid a claim, the agreement contained a clause specifying that “the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and [Auto-Owners.]”

Read as a whole, these provisions make plain that Auto-Owners had the discretion to adjust, settle, or compromise any claim on the bonds.⁴ Further, under the plain terms of the agreement, the Campbells were required to reimburse Auto-Owners without regard to whether Auto-Owners was ultimately correct in paying the bond claims, provided that Auto-Owners acted in good faith. The phrase “good faith” has typically been understood “as a standard measuring the state of mind, perceptions, honest beliefs, and intentions of the parties.” *Miller v Riverwood Recreation Ctr, Inc*, 215 Mich App 561, 570; 546 NW2d 684 (1996). “Good faith” refers to “‘an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.’” *Id.* at 571, quoting *Black’s Law Dictionary* (6th ed), p 693. “Bad faith” refers to an “arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty,” involving something more than honest errors of judgment. *Miller*, 215 Mich App at 571 (quotation marks and citations omitted) (defining “bad faith” in the context of insurance). See also *Great American Ins Co v E L Bailey & Co, Inc*, 841 F3d 439, 446 (CA 6, 2016).

Notably, under the terms of their agreement, evidence that Auto-Owners paid a claim is prima facie evidence of the Campbells’ liability and the extent of that liability. The phrase “prima facie evidence” refers to “evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party.” *American Cas Co v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989). The admission of prima facie evidence shifts the burden of proceeding so that the opposing party must come forward with evidence to rebut or contradict that party’s liability. *P R Post Corp v Maryland Cas Co*, 403 Mich 543, 552; 271 NW2d 521 (1978). More specifically, in the context of indemnifying a surety, when payment of a bond claim serves as prima facie evidence of liability, the indemnitor disputing liability has the burden of proving that the surety acted in bad faith or otherwise violated the indemnity agreement. See *Gray Ins Co v Terry*, 606 F Appx 188, 191 (CA 5, 2015); *Travelers Cas & Surety Co of America v Winmark Homes, Inc*, 518 F Appx 899, 903 (CA 11, 2013); *Fallon Elec Co, Inc v Cincinnati Ins Co*, 121 F3d 125, 128-129 (CA 3, 1997). Such clauses are enforceable. *Transamerica Ins Co v Bloomfield*, 401 F2d 357, 362 (CA 6, 1968).

⁴ While the Campbells could have requested that Auto-Owners litigate a claim, under the indemnity agreement, the Campbells would have had to make a request and they would have been required to deposit cash or collateral with Auto-Owners. The Campbells were notified that the City had made a bond claim, but there is no evidence that the Campbells requested that Auto-Owners litigate the bond claim or that the Campbells deposited cash or collateral with Auto-Owners. Auto-Owners therefore had discretion under the indemnity agreement to pay the claim.

In this case, Auto-Owners presented proof that it paid the City and ABC Supply Company, and these payments constituted prima facie evidence of the Campbells' liability and the extent of that liability under the indemnity agreement. Therefore, if the Campbells wished to contest their liability, they bore the burden of proving that Auto-Owners failed to act in good faith or otherwise violated the indemnity agreement. Given that the Campbells bore this burden, in responding to Auto-Owners' motion for summary disposition under MCR 2.116(C)(10), the Campbells could not simply "rely on mere allegations or denials in pleadings, but [had to] go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact [existed]." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The Campbells have not presented specific facts showing that a question of fact existed with regard to whether Auto-Owners acted in bad faith. At best, the Campbells have established that Auto-Owners exercised business judgment with which the Campbells disagreed.

For instance, contrary to the Campbells' assertion that Auto-Owners paid the claims without investigating or consulting with the Campbells, Auto-Owners, by correspondence dated November 24, 2010, reiterated that bond claims had been made and advised the Campbells that they were personally responsible for fully indemnifying Auto-Owners for costs and expenses related to the losses in connection with the bonded project. Auto-Owners also expressly requested that the Campbells "[p]lease contact the undersigned as to how you intend to address this matter which appears to be well in excess of \$100,000," and further specified that "your immediate attention in this matter is essential." There is no evidence that the Campbells contacted Auto-Owners regarding the bond claims. Also noteworthy, Jack Campbell admitted that ABC Supply Company was owed monies on the project. In addition, the City provided documentation to Auto-Owners in support of the City's bond claim—a punch list itemizing the outstanding items yet to be completed and the related costs. Although the Campbells make the bald assertion that the bond claims were settled by Auto-Owners in bad faith and that therefore an issue of fact existed about the good faith of Auto-Owners' payments, the Campbells did not come forward with any evidence to create a genuine issue of fact in this regard. Accordingly, the trial court erred when it denied Auto-Owners' motion for summary disposition.

IV. THE CITY'S APPEAL

The Campbells' complaint alleged that the original contract required payment for its services in the amount of \$224,920, but that as a result of the change orders, \$391,155.27 was the amount owed. The Campbells acknowledged that they were paid \$331,531.30, but alleged in their complaint that \$59,623.97 was still due. The Campbells also alleged that the City breached § 2.2 of the contract by failing to give 90 days' written notice prior to termination. According to the Campbells, because they were not given this notice, they were not allowed to complete the project and they are entitled to the damages resulting from this termination without notice.

The City's sole argument in its motion for summary disposition was that the City did not breach the contract by terminating the Campbells without notice in August 2010 because the contract had long expired, and thus the City was not bound by the 90-day notice provision. This argument is flawed for two reasons. First, fairly read, the Campbells' complaint sought payment for \$59,623.97 worth of work that they allegedly completed before they were terminated in August 2010. Whether the 90-day provision applied is not dispositive of whether the Campbells were entitled to payment for supplies and work actually performed before termination.

Second, to the extent that the Campbells sought damages resulting from termination without 90 days' notice, it appears that a question of fact remained as to whether this provision was in effect in August 2010. In particular, the original contract provided for an expiration date of December 19, 2009, and a change order modified this expiration date by providing a substantial completion date of May 13, 2010. However, the Campbells maintain that there was an implied contract to extend the agreement beyond the May 2010 completion date. After an agreement has expired, an implied contract may arise when the parties continue to perform as before and their conduct demonstrates a mutual assent to a new agreement with their rights and obligations measured as provided in the expired contract. 17A Am Jur 2d, Contracts, § 576.

A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. The existence of an implied contract, of necessity turning on inferences drawn from given circumstances, usually involves a question of fact, unless no essential facts are in dispute. [*Erickson v Goodell Oil Co, Inc*, 384 Mich 207, 212; 180 NW2d 798 (1970) (citation omitted).]

In this case, there is evidence that, even after May 13, 2010, the Campbells and the City continued to do business together with the Campbells continuing to act as general contractor for the project. For instance, there is correspondence to the Campbells, dated after May 2010, discussing the windows, scheduling, and items yet to be completed. Even the City's termination letter to the Campbells, terminating "the contract" as of August 24, 2010, could be read to support the proposition that the parties were still mutually operating under the terms of the written agreement, which would have included the 90-day notice provision.

Considering the foregoing, questions of fact existed with respect to whether the 90-day notice provision was in effect and whether the Campbells were entitled to additional compensation for services rendered. Accordingly, the trial court did not err when it denied the City's motion for summary disposition regarding the Campbells' breach-of-contract claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Kelly